

**Report to the Kentucky Library Association Board
Strategic Planning & Organization Review Committee
Quarterly Report
Saturday, November 21, 2009
Louisville, Kentucky**

As the chair of the Strategic Planning & Organization Review Committee and in accordance with this association's commitment to continuous quality improvement and its strategic planning process, the following is suggested:

The Blue Book is currently lacking sections that address matters of great importance to KLA, and any nonprofit professional organization for that matter. Specifically, there is nothing in the Blue Book that addresses the Sherman Act and its antitrust provisions, which are absolutely germane to the nonprofit sector, including professional organizations such as KLA, and represent an area of law that any nonprofit should dissertate in its governing documents.

Background

The United States endorses a free system of economics in which trade should be uninhibited. In response to infringements on free market trade by monopolies, the United States Congress passed the Sherman Act of 1890 (with subsequent amendments found within the Clayton Act and Robinson-Patman Act), with section one having the most prominent implications for the nonprofit sector and KLA:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.”

And from this act there now exists:

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

One can see that the punishments for both the association and individuals are rather severe, and although this Act was originally intended for the for-profit sector, the nonprofit sector is by no means exempt from the restrictions and penalties of this Act, and this is the reason why each nonprofit should be aware of this Act, what constitutes a violation of this Act, what threats the penalties hold for the organization and its members, including the leadership, and what steps should be taken to avoid legal, and even ethical, issues related to this Act. Concrete examples of clear violations of this Act include but are not limited to:

- joint refusals to deal with an entity
- price-fixing agreements
- group boycotts

It is important to realize that a professional association need not endorse a policy or action that is in violation of the Act, as simply serving as the means by which violations occur (i.e., through board discussion, association member discussions, etc.) is enough to bring the organization into violation and possible litigation; incidentally, anti-trust litigation tends to be some of the more expensive and time-intensive judicial proceedings there exist. Furthermore, circumstantial evidence and inference garnered from conversations, e-mail exchanges, and the like are enough to bring an organization into the danger zone of litigation.

Recommendations

In light of these omissions in the Blue Book, it is highly recommended that KLA adopt at its earliest opportunity certain additions to the Blue Book and to the process by which it is run as regarding the Sherman Act.

Therefore, via the strategic planning process, an **Antitrust Compliance Program** should be instated. Specifically:

I. The development of an **Antitrust Compliance Section** within the Blue Book, which should ideally include:

- an **Antitrust Compliance Statement**, with an appropriate example for KLA being:

“The Kentucky Library Association intends to comply with all applicable antitrust laws. Under no circumstances will KLA directly or indirectly be

involved in any conduct or communications that lead to or imply an attempt to solicit an agreement among its members that would restrain trade and/or otherwise violate antitrust laws. Any conduct by KLA’s officers, directors, employees or members that is contrary to the antitrust laws is contrary to KLA intentions. Any officer, director, employee or member found in violation of this intention or the applicable antitrust laws shall be subject to appropriate actions”;

- a section regarding the Antitrust Compliance Statement’s distribution.
Specifically, the Antitrust Compliance Statement should be disseminated to the membership and the board, and both current and future members of the board should be required to sign a document (created by the board) that certifies that he or she has read the Antitrust Compliance Statement and understands its contents;
- a section detailing the punishment that could be potentially administered by KLA for violation of the policy by members of the association;
- a section detailing the length of time that relevant documents are retained.

II. An **Antitrust Compliance Officer** position should be created, either by adding these duties to an existing position of the KLA board or by adding an additional position to the KLA board. This person would be responsible for the ongoing administration of the Antitrust Compliance Program; and

III. The inclusion of the Antitrust Compliance Statement on ALL association ListSrvs with details on how this policy affects posts to the ListServ, as communications in violation of antitrust laws via ListSrvs hosted by the association, regardless of whether the association endorses or is even aware of such communications, can draw the

association into litigation. In fact, the association could even consider developing a policy regarding ListServs hosted by KLA in which members and others cannot post in real-time; rather, perhaps there should be a daily digest issued, after having been examined by certain members of the board or the association; however, the real challenge and drawback here would be that such a policy could be rather time-intensive to implement.

Conclusion

In the end, the development by KLA of a formal Antitrust Compliance Program incorporated into the Blue Book and executed properly and on an ongoing basis would convey to the membership and those outside the association the importance that KLA places on compliance with the Sherman Act and its antitrust provisions in addition to providing documented evidence of actions taken by the board and the association to comply with the law. And certainly if legal counsel is available to the association, it would be ideal for a trained lawyer to examine all aspects of the developed Antitrust Compliance Program.

Citations

Cantor, Matthew L. and Jeffrey I. Shinder. "Smart Antitrust Compliance Programs." Corporate Board. 23.132 (2002): 7-12.

Jackson, Peggy M. and Toni E. Fogarty. Sarbanes-Oxley for Nonprofits: a Guide to Building Competitive Advantage. Hoboken, NJ: John Wiley & Sons, Inc., 2005.

King, Kimberly L. "An Antitrust Primer for Trade Association Counsel." Florida Bar Journal 75.5 (2001): 26-33.

Smith, Buckin & Associates. The Complete Guide to Nonprofit Management. Ed. Robert H. Wilbur. New York: John Wiley & Sons, Inc. 2000.

Additional, Unrelated Issue

And regarding an issue not related to antitrust compliance and involving this committee, the Blue Book currently does not have certain association officer and award listings updated, and this committee is in the process of updating those listings.

Respectfully submitted,

Robert Gieszl, Chair
Strategic Planning & Organization Review Committee